

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF WISCONSIN

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**EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,**

Plaintiff,

v.

**Case No. 2:14-cv-1019**

**ORION ENERGY SYSTEMS, INC.,**

Defendant.

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**ANSWER AND AFFIRMATIVE DEFENSES**

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The Defendant, Orion Energy Systems, Inc. ("Orion Energy"), by and through its attorneys, Krukowski & Costello, S.C., hereby admits, denies and alleges as follows:

**ANSWER**

**NATURE OF THE ACTION**

Orion Energy admits that the Equal Employment Opportunity Commission ("Commission") has alleged a violation of the Americans With Disabilities Act. Orion Energy, however, denies any violation of that law or any other law with respect to the allegations brought by the Commission on behalf of Ms. Wendy Schobert.

**JURISDICTION AND VENUE**

1. Answering Paragraph 1, Orion Energy admits that the Commission instituted and brought its claims under a federal statute, and therefore, this Court has jurisdiction over this action. Orion Energy, however, denies that it violated that federal statute with respect to Ms. Schobert.

2. Answering Paragraph 2, Orion Energy admits that venue is proper in this Court, but denies any wrongful employment practices were committed by it with respect to Ms. Schobert within the jurisdiction of the United States District Court for the Eastern District of Wisconsin or any other jurisdiction.

**PARTIES**

3. Answering Paragraph 3, Orion Energy admits the Commission is authorized to bring this action if all statutory requirements are satisfied, but Orion Energy denies all statutory requirements have been satisfied.

4. Answering Paragraph 4, Orion Energy admits.

5. Answering Paragraph 5, Orion Energy admits.

6. Answering Paragraph 6, Orion Energy admits.

**STATEMENT OF CLAIMS**

7. Answering Paragraph 7, Orion Energy admits that thirty (30) days prior to initiation of this lawsuit, Ms. Schobert filed a Charge with the Commission alleging violations of the Americans With Disabilities Act by Orion Energy, but Orion Energy denies that all conditions precedent have been fulfilled.

8. Answering Paragraph 8, Orion Energy admits that the Commission invited it to join in a conciliation effort and that the Commission sent out a notice of failure of conciliation on August 28, 2012, but Orion Energy denies that a good faith effort to conciliate was undertaken by the Commission.

9. Answering Paragraph 9, Orion Energy denies.

10. Answering Paragraph 10, Orion Energy admits that it began to implement a Wellness Program in the March 2009 timeframe in which employees were required to complete a

Health Risk Assessment as part of the Wellness Program. Orion Energy denies that employees were required to use a Range of Motion Machine as part of the Wellness Program.

11. Answering Paragraph 11, Orion Energy admits.

12. Answering Paragraph 12, Orion Energy admits.

13. Answering Paragraph 13, Orion Energy admits Ms. Schobert objected to participation in the Wellness Program and questioned whether medical information obtained in connection with it would be maintained as confidential, but alleges a lack of knowledge or information sufficient to form a belief as to the truth of the allegation that Ms. Schobert questioned whether the Health Risk Assessment was voluntary.

14. Answering Paragraph 14, Orion Energy alleges a lack of knowledge or information sufficient to form a belief as to the truth of the allegations that Ms. Schobert was called into a meeting with the Human Resources representative and her supervisor and whether Ms. Schobert was told that she was not to express any opinions about the Wellness Program to her co-workers, but denies that the purpose of the meeting was to quash any potential attitude issues of Ms. Schobert's relating to the Wellness Program.

15. Answering Paragraph 15, Orion Energy admits.

16. Answering Paragraph 16, Orion Energy admits that Ms. Schobert was required to pay the entire cost of the health insurance premium for single coverage if she wanted insurance benefits from the Orion Energy health insurance plan based on her non-participation in the Wellness Program, but deny that Orion Energy would have covered the entire amount of her health care costs if she did participate in the Wellness Program.

17. Answering Paragraph 17, Orion Energy admits Ms. Schobert had to pay \$413.43 per month, which constituted the cost of the health insurance premium for single coverage, in

order to continue her insurance coverage after opting out of the Wellness Program. Orion Energy admits Ms. Schobert had to pay an additional \$50 per month for failing to partake in the fitness component but denies the \$50 per month contribution was a penalty.

18. Answering Paragraph 18, Orion Energy admits.

19. Answering Paragraph 19, Orion Energy admits that Ms. Schobert was the only employee who elected health insurance from Orion Energy who declined to participate in the Wellness Program.

20. Answering Paragraph 20, Orion Energy admits.

21. Answering Paragraph 21, Orion Energy denies.

22. Answering Paragraph 22, Orion Energy denies.

#### **COUNT 1: UNLAWFUL MEDICAL EXAMINATIONS AND INQUIRIES**

23. Answering Paragraph 23, Orion Energy realleges and incorporates by reference its responses to Paragraphs 1 through 22 herein.

24. Answering Paragraph 24, Orion Energy denies.

25. Answering Paragraph 25, Orion Energy denies.

26. Answering Paragraph 26, Orion Energy denies.

27. Answering Paragraph 27, Orion Energy denies.

28. Answering Paragraph 28, Orion Energy denies.

#### **COUNT 2: RETALIATION**

29. Answering Paragraph 29, Orion Energy realleges and incorporates by reference its responses to Paragraphs 1 through 22 herein.

30. Answering Paragraph 30, Orion Energy denies.

31. Answering Paragraph 31, Orion Energy denies.

32. Answering Paragraph 32, Orion Energy denies.

**COUNT 3: INTERFERENCE, COERCION AND INTIMIDATION**

33. Answering Paragraph 33, Orion Energy realleges and incorporates by reference its responses to Paragraphs 1 through 22 herein.

34. Answering Paragraph 34, Orion Energy denies.

35. Answering Paragraph 35, Orion Energy denies.

36. Answering Paragraph 36, Orion Energy denies.

**AFFIRMATIVE DEFENSES**

1. The Complaint fails to state a claim upon which relief can be granted.

2. To the extent that Ms. Schobert has failed to mitigate her damages, the Commission is barred from recovery from Orion Energy.

3. The Commission is barred from recovery for any compensatory or punitive damages because retaliation claims under the Americans With Disabilities Act do not provide for that type of relief, and the Commission is also not entitled to a jury as a result.

4. The Wellness Program at issue is a bona fide benefit plan that is based on underwriting risks, classifying risks, or administering such risks. As a result, the claims by the Commission are barred.

5. The Wellness Program at issue is a bona fide benefit plan that is not subject to state laws that regulate insurance. As a result, the claims by the Commission are barred.

6. The Health Risk Assessment and the fitness component of Orion Energy's Wellness Program were voluntary medical examinations. As a result, the claims by the Commission are barred.

7. Due to the passage of time, the doctrine of laches may bar the claim by the Commission on behalf of Ms. Schobert.

8. The Commission has failed to undertake reasonable and good faith conciliation efforts with respect to Ms. Schobert's allegations.

**PRAYER FOR RELIEF**

WHEREFORE, Orion Energy respectfully requests that the Court:

1. Dismiss the Complaint with prejudice and on its merits;
2. Award Orion Energy the costs and attorney's fees incurred in defending this action; and
3. Grant Orion Energy such other relief as the Court deems just and proper.

Dated at Milwaukee, Wisconsin this 16th day of October, 2014.

/s/ Kevin J. Kinney

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